No. 3750

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

GRECO CANNING COMPANY
(a corporation),
Plaintiff in Error,

vs.

P. PASTENE & COMPANY, Incorporated
(a corporation),
Defendant in Error.

OPENING BRIEF FOR PLAINTIFF IN ERROR.

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Statement of Facts.

The present action was commenced to recover damages for the breach of a contract to manufacture and deliver 3,000 cases of Salsa De Pomidoro or "Italian Tomato Paste" of the 1916 pack. The defendant delivered, under the contract, 665 cases, or approximately 22 per cent. of the quantity contracted for to the plaintiff in the court below. The defendant in error here proceeded upon the theory that it was entitled to recover upon a basis of a full and complete delivery of the quantity contracted for.

The contract entered into between the parties is set out as Exhibit "A" to the complaint (see Tr. p. 4), and provided as follows:

> "The GRECO CANNING Co., of San Jose, California, hereinafter called seller, this day sold, and P. Pastene & Co., New York City, N. Y., hereinafter called buyer, this day bought the following described goods—1916 pack:
>
> (2000) Two thousand cases Salsa De Pomidoro packed 200 tins to the case, six oz. each, in wooden cases at Three Dollars and Fifty cents ($3.50) per hundred tins.
>
> (2000) Two thousand cases Salsa De Pomidoro packed 200 tins to the case, six oz. each, in fiber cases at Three Dollars and Fifty cents ($3.50) per hundred tins.
>
> TERMS: The above-named goods are f.o.b. cars San Francisco, less 1½% cash discount, Sight Draft Bill of Lading attached.
>
> GUARANTEE: Buyers guarantee full acceptance unless this contract is otherwise changed by mutual consent of both seller and buyer. Seller guarantees that the goods covered by this contract are not adulterated, mislabeled, or misbranded within the meaning of the National Food and Drug Act, June 30, 1906: or the California Pure Food Act, March 11, 1907. Seller is relieved from any responsibility for misbranding when goods are not shipped under sellers' label. Quality to be of same consistency as the Imported, of good flavor and color. Samples for approval to be submitted prior to shipping and shipment to correspond with samples.
>
> CONDITIONS: Goods at risk of buyer from and after shipment, although shipped to seller's order. In case of short pack, seller agrees to make prorate delivery only. If seller should be unable to perform all its obligations under

this contract by reason of a strike, fire, or other circumstances, beyond its control, such obligations shall at once terminate and (4) cease. Usual swell guarantee—viz.—Seller guarantees swells not to exceed ½ to 1%.

Shipment to be made as soon as practical after packing. All goods remaining unshipped to be billed and paid for not later than November 1, 1916. Buyer agrees to protect draft against documents for invoice value on presentation. Seller agrees to store said goods and insure them at buyer's expense, should buyer so desire, until December 1, 1916.

Seller: Greco Canning Co.
By V. V. Greco,
Sec. and Tres.

Buyer: P. Pastene & Co.
By Chas. A. Pastene,
Pres.

Sweet Basil or Basilico.

One leaf of fresh Basil to be put in each tin, either on top or bottom of contents."

The plaintiff in error contends that it pro-rated delivery under the following provision of the contract:

"In case of short pack, seller agrees to make prorate delivery only. If seller should be unable to perform all its obligations under this contract by reason of a strike, fire, or other circumstances, beyond its control, such obligations shall at once terminate and cease."

In suport of this the plaintiff in error, introduced evidence in the court below showing that there was a short pack caused partly by reason of a failure in the tomato crop due to weather conditions, and

partly to trouble caused by breakdowns in its machinery.

There is no dispute that if this defense is good the defendant in error received a full pro rate proportion of the pack to which it would have been entitled.

The trial court rendered its decision in favor of the defendant in error upon two grounds: (1) that there was a crop shortage of the 1919 crop, of not to exceed 20 per cent of normal; and, (2), that the breakdowns in the machinery of the plaintiff in error cannot be considered in determining whether there was a short pack, and did not come within the meaning of the words "other circumstances beyond its control." It is our contention that the words "short pack" are more embracing than merely "short crop," but that even if they were not broader in scope the evidence conclusively shows that there was sufficient crop shortage to justify no judgment in excess of $975.00. Second, that the evidence also shows that the contract construed in the light of the surrounding circumstances and the actions of the parties thereto was intended to excuse the plaintiff in error from full delivery if the impossibility of performance was due to breakdowns in machinery.

Specification of the Errors Relied On.

The tenth specification of errors (See Tr. p. 227) embraces all of the matters required for a discussion

of the two points hereinabove referred to. This specification is as follows:

"That the said District Court erred in making its decision and findings in the nature of a decision filed by the Honorable W. C. Van Fleet, District Judge in the above-entitled action in the following particulars:

(a) The court erred in failing to sustain the defense that there was a failure of crops and that such failure of crops was sufficient to justify the defendant in delivering only a short pack under the terms of its contract.

(b) The court erred in finding against the defendant's contention that the early rains and frosts damaged the crops to such an extent as to make it impossible to deliver other than a short pack to the plaintiff.

(c) The court erred in holding and finding that the burden was upon the defendant under its contract to secure tomatoes grown in other sections than the Santa Clara Valley and requiring the defendant to purchase tomatoes regardless of location.

(d) The court erred in finding and holding that the burden was upon defendant to show that fruit for the purposes of fulfilling the contract could not have been secured in other parts of the State than the particular locality in which the cannery of the defendant was located.

(e) The court erred in fact and in law in holding and finding that the evidence failed to disclose an effort on the part of the defendant to secure canning tomatoes in sections other than the Santa Clara Valley.

(f) The court erred in holding and finding that the defendant was justified in abating his

contract only to the extent of 20% from a full delivery.

(g) The court erred in holding and finding that the phrase 'circumstances beyond its control' did not include circumstances preventing the defendant from fulfilling his contract in terms.

(h) The court erred in finding that there was no custom making a failure under the circumstances asserted by the defendant and shown by the evidence to be within a custom of the trade recognizing the right to deliver a short pack.

(i) The court erred in holding and finding that nothing is regarded by the trade as justifying a short pack other than causes beyond the control of the packer such as those stipulated in the contract or of a kindred character.

(j) The court erred in holding and finding that the evidence did not sustain the contention that the parties in their dealings have given the contract the construction contended for by defendant.

(k) The court erred in holding and finding that the Plaintiff in his correspondence had not waived objections to the delivery of a short pack and had recognized the impossibilities of the defendant delivering in full under the contract.

(l) The court erred in holding and finding that it was impossible for the defendant to have procured canning fruit in other localities than those adjacent to the cannery in view of the uncontradicted evidence that fruit for the peculiar product must be secured in the immediate vicinity and be immediately manufactured when picked.

(m) The court erred in holding and finding that the plaintiff in its correspondence, in which it stated, 'If you make every possible effort to produce these goods within your power, as we doubt not you are doing, we will surely meet you in reasonable fashion in considering the unfortunate condition which has confronted you,' did not have a reference to the conditions relating to machinery and did not intend by such correspondence to waive the delivery of a short pack.

(n) The court erred in holding and finding that the defendant did not deliver the full pro rata to the plaintiff to which plaintiff was entitled.

(o) The court erred in holding and finding that the plaintiff's correspondence and letters acknowledging letters from the defendant did not constitute an acquiescence in the delivery of a short pack by the defendant and the necessity therefor.

(p) The court erred in holding and finding that the plaintiff was entitled to a judgment based upon a delivery of 80% of the quantity contracted for, less the quantity already delivered, and for its costs."

Argument.

I.

THE COURT ERRED IN FINDING THAT THE DEFENDANT IN ERROR WAS ENTITLED TO AN 80% DELIVERY.

In the opinion filed by Judge Van Fleet and cited at page 212 of the Transcript, the court states that the evidence was indefinite as to the effect of

the rains and frosts in other counties than Santa Clara, which was the county in which the cannery of the plaintiff in error was located. And the court goes on to say that there is nothing in the terms of the contract requiring that the goods contracted for be produced from tomatoes grown in any particular section, and that therefore it was incumbent upon the plaintiff in error to show that the fruit could not be grown in other parts of the state in quantity to fulfill the contract. In support of this statement the court cites the case of

> *Newall v. New Holstein Canning Co.,* 119 Wis. 635; 97 N. W. 487.

We respectfully call this court's attention to the following language in that case:

> "For aught that the evidence discloses, appellant might have secured all of the tomatoes needed in the market *within a reasonable distance from the factory,* making it feasible and practicable to buy the fruit and transport it to the cannery for the purpose of this undertaking."

In the case at bar the evidence is uncontradicted that it was neither feasible nor practicable to buy fruit for the purpose of making this particular product anywhere except within the immediate vicinity of the cannery, nor was it possible to purchase it in the immediate vicinity after the failure of the crop, for the reason that the entire crop in that vicinity is always completely contracted for at the commencement of the season, and there is nothing available in the event of a crop failure.

Mr. H. T. Rigg, a witness for the defendant in error, testified as follows (Tr. p. 146):

> "In the other part of the plant they could use a different quality of tomatoes. They could use tomatoes a little greener than they could in the vacuum, and for the making of Salsa De Pomidoro *it should be a perfectly ripe tomato. They are sorted stock, sorted tomatoes.* Those that were of the commoner or inferior quality would be sent over to the other side and put into the general product."

Victor V. V. Greco also testifying on behalf of the plaintiff in error said (Tr. p. 38):

> "It was our custom to buy *in the immediate vicinity, so as to get best results, get better quality of raw material, and get it to our canning plant fresh,* so our contracts were mostly entered into in the Santa Clara County Valley. We never aimed to buy outside at any great distance. In doing that we were following the usual custom of our plant."

And further (Tr. p. 40):

> "After this rain occurred it was followed by a heavy frost. As a result of that rain and frost we could not secure tomatoes to continue the running of our plant, and *it could never be done, because we cannot buy tomatoes in the open market; there are none to be had.* The tomatoes are usually contracted for by the canneries. We figure out our tonnage of requirements, and we base our acreage on the yield per ton and contract accordingly. When we buy tomatoes, we do not buy by tons, but *we contract for acreage* of different patches, maybe ten, twenty or thirty patches; one patch will have five acres, another 20 or 30 or 40. We

contract to take all their tomatoes, provided they are ripe and in good condition. After this rain and frost occurred, it would absolutely not have been possible within my knowledge, to have secured tomatoes *in any other locality, either in California or elsewhere.*"

And further (Tr. p. 92) the witness was asked:

"Q. And now, Mr. Greco, let me ask you, what quality of tomato—no, I withdraw that—is there any special quality of tomato that is required in order to make the Salsa de Pomidoro?

"A. No special quality of tomato, except that *tomato must be at its best when it is good, mature.* In other words, a very early tomato, ordinarily the farmer will pick it before it is completely matured so as to begin shipping, and later on in the season, when the sunshine is not sufficient, why you do not then get the same color again and it is not adapted for that particular purpose because *you require a very highly matured and red tomato to make a good product.*

"Q. And in order to make this product was it, or was it not, your effort to secure the tomatoes *in exactly the prime condition for that purpose?*

A. *Yes, sir.*

Q. And after the rain and the frost had fallen on these tomatoes, *were they in a condition to make this product?* A. *No, sir, they were not.*"

This testimony stands in the record uncontradicted; it completely refutes the statement of the court below to the effect that it was incumbent upon the plaintiff in error to show that the fruit could not have been secured in other parts of the State in

quantity to fulfill the contract. There was no fruit in other parts of the State to be purchased; nor would it have availed the plaintiff in error had it been purchasable because it was essential to the proper manufacture of this product that only prime ripe tomatoes be used, and for that reason only the choicest of the product grown in the immediate vicinity would be available for this purpose. We must bear in mind that the contract excuses full delivery in case of "short pack." Assuming, for the sake of argument, that "short pack" means nothing more than "short crop," we find, from the evidence, that the plaintiff in error contracted for between 500 to 550 acres of tomatoes during the 1916 season (Tr. p. 183).

The witness Greco being recalled, testified as follows (Tr. p. 183 and 184):

> "Since I was on the witness-stand I have made investigation and computation to ascertain as closely as I could the acreage which we had under contract for delivery to us in Santa Clara in 1916. The acreage was between 500 and 550 acres. The number of tons of tomatoes delivered to our cannery during the season of 1916 was a little over 2,000. I can estimate the amount of tonnage which there was in the acreage which we had contracted for delivery to us. We should have had not less than 5,500 tons delivered from that acreage, and there were delivered to us from that acreage a little over 2,000. The failure of the delivery of the remaining 3,000 odd tons was not due to any action on our part."

This testimony shows that there was a failure of 3500/5500 of the crop upon the acreage contracted for by the plaintiff in error in the immediate vicinity of his cannery, where it was necessary that the tomatoes for use in the manufacture of this product be grown. Reducing these fractions to decimals it shows that the defendant obtained about 36.36% of the crop it expected to get.

Mr. Greco testified (Tr. p. 122): That he contracted to sell 18,930 cases of Salsa alone, and he figured that it would take about 2800 tons of tomatoes to pack that number of cases of Salsa. As the plaintiff in error only received a little more than 2000 tons of tomatoes altogether it will be readily seen that it was impossible to make a full delivery, even of the Salsa De Pomidoro, and, of course, if he had contracts for the sale of other products as well, the pro rata proportion would be very small.

Assuming, therefore, that short pack means short crop only, the plaintiff under the uncontradicted evidence in this case is only entitled to 36.36% delivery upon its contract. The contract having been for 3000 cases, this would entitle the plaintiff to 1090 cases. The plaintiff had already received 665 cases, which would leave approximately 325 cases to which it would still be entitled under its own theory of the case. The damage suffered by the plaintiff is the difference between the contract price, namely, $7.00 per case, and the market price, which was stipulated to have been $10.00 per case, or $3.00.

This would fix the total damages of the plaintiff at the sum of $975.

II.

THE TRIAL COURT ERRED IN HOLDING THAT THE TERM "SHORT PACK" WAS LIMITED ONLY TO "SHORT CROP" AND THAT THE PARTIES TO THE CONTRACT DID NOT BY THEIR ACTIONS UNDER IT AND PRACTICAL INTERPRETATION THEREOF CONSTRUE THE BREAKDOWN OF THE MACHINERY AS AN EXCUSE FOR FULL DELIVERY.

The parties to this contract stipulated that performance would be excused in case of "short pack." They further stipulated that the obligations of the seller should terminate and cease if it should be unable to perform its obligation by reason of a strike, fire, or other circumstances beyond its control.

The parties were not contracting for the delivery of so many goods of a particular kind, but with reference to a specific article which was to be manufactured expressly for the defendant in error, and in which contract the defendant in error even went so far as to require *samples for approval* and a direction for a leaf of fresh Basil to be put at the top or bottom of every tin.

Even at common law and without such stipulations in the contract as those contained here, where the contract relates to dealings with specific things in which the performance depends upon the existence of a particular thing, in the event of the destruction

of the thing without default in the party contracting performance is excused, because from the very nature of the contract it is apparent that the parties contracted on a basis of the existence or production of the subject of the contract.

In the leading case of—

Howell v. Coupland, L. R. 1 Q. B. Div. 258,

the defendant agreed to sell to the plaintiff 200 tons of potatoes grown on land belonging to him, the potatoes to be paid for when they were taken away. There was a crop failure caused by a disease of the plant and it was held that the defendant was exonerated from performing, the court saying (p. 299):

> "This is not like the case of a contract to deliver so many goods of a particular kind, where no specific goods are to be sold. Here there was an agreement to sell and buy two hundred tons out of a crop to be grown on specific land, so that it is an agreement to sell what will be and may be called specific things; therefore neither party is liable if the performance becomes impossible. The language of this contract is much easier to imply a condition from than in most former cases where it has been held to be implied."

In *Mineral Park Land Co. v. Howard,* 172; Cal. 289,

the Supreme Court of this state said (pp. 292 and 293):

> "It is, however, equally well settled that where performance depends upon the existence of a given thing, and such existence was assumed as the basis of the agreement, perform-

ance is excused to the extent that the thing ceases to exist or turns out to be nonexistent. (1 Beach on Contracts, sec. 217; 9 Cyc. 631.)"

* * * * * *

"The parties were contracting for the right to take earth and gravel to be used in the construction of the bridge. When they stipulated that all of the earth and gravel needed for this purpose should be taken from plaintiff's land, they contemplated and assumed that the land contained the requisite quantity, available for use. The defendants were not binding themselves to take what was not there. And, in determining whether the earth and gravel were 'available,' we must view the conditions in a practical and reasonable way. Although there was gravel on the land, it was so situated that the defendants could not take it by ordinary means, nor except at a prohibitive cost. To all fair intents then, it was impossible for defendants to take it. 'A thing is impossible in legal contemplation when it is not practicable; and a thing is impracticable when it can only be done at an excessive and unreasonable cost.' (1 Beach on Contracts, sec. 216.) We do not mean to intimate that the defendants could excuse themselves by showing the existence of conditions which would make the performance of their obligation more expense than they had anticipated, or which would entail a loss upon them. But where the difference in cost is so great as here, and has the effect, as found, of making performance impracticable, the situation is not different from that of a total absence of earth and gravel."

In the case at bar the parties were contracting for a specific article to be manufactured specially for the defendant in error, and it is submitted that having made every effort in good faith to perform, and

having failed through no fault of his own, not within the contemplation of the parties, plaintiff in error is excused from further performance. Not only does the contract upon its face show that the words "short pack" are broader in significance than "short crop", but the parties themselves acted upon and placed a particular construction upon the language of the contract showing clearly that they intended and believed the term "short pack" to include and excuse short delivery by reason of the circumstances which appeared in the evidence of this case.

The parties to a contract have the right to put their own construction upon it and to regulate their rights and liabilities thereunder, and where parties to a contract have so construed and interpreted it, the courts generally adopt that construction in arriving at the meaning of the contract.

Guaranty Trust Co. of N. Y. v. Koehler, 195 Fed. 669;
Nelson v. Ohio Cultivator Co., 188 Fed. 620;
Carter v. Hengst, 246 Fed. 674;
In re Thomas, 231 Fed. 513;
Keith v. Elec. Engineering Co., 136 Cal. 178;
District of Columbia v. Gallaher, 124 U. S. 505, 31 L. Ed. 526.

In *Attorney General v. Drummond,* 1 Dr. & War 368, Sugden, Chancellor, said: "Tell me what you have done under a deed, and I will tell you what that deed means."

It is our contention that an analysis of what the parties to this agreement have done under the agreement will show that it was their intention to relieve the defendant from the failure to make full delivery by reason of the circumstances that prevented it from entirely performing the contract. The contract was not a mere contract for the sale of an ordinary commodity upon the market, but was a contract for the sale of a new product never before manufactured in the United States and which required special machinery for its manufacture and which was known to require such special machinery by both parties, and was for the product of the defendant's own cannery and for no other product.

The contract attached as an exhibit to the complaint was for the sale of the 1916 pack of Salsa De Pomidoro, that is, of that product which was to be packed from the 1916 crop of tomatoes. The contract contains a clause, "Shipment to be made as soon as practicable *after packing.*" It also provides for the submission of samples for approval prior to shipping and shipment to correspond with samples. That the pack of the defendant's cannery, and of defendant's cannery only, was intended by these provisions is further shown by a letter of May 8th addressed to the Greco Canning Co., by P. Pastene & Co., and which in effect is a modification and commentary upon the contract itself (See Tr. p. 78). Quoting from that letter:

> "You will notice that we have inserted in a couple of places additional words to clear the

> meaning of what we had no doubt was exactly your intent in said contract but we thought that possibly it would be best for all concerned to have the matter clearly stipulated.
>
> The first is in reference to approval of sample. Naturally, in view of the fact *that you have never made any of this article and therefore we have no means of knowing what you will put up,* it is essential that we have an opportunity to pass judgment on the type of article *you will manufacture* by having sample tins sent for approval or rejection."

If, therefore, it became impossible for the defendant to manufacture this article, the contract of the parties, by their own construction and interpretation, excuses the defendant from a failure to make full delivery. In this connection the case differs from that of *Carnegie Steel Co. v. United States,* 240 U. S. 156, cited by the trial court. In that case it appeared that the difficulties encountered were unforeseen by both parties when the contract was made, and that, therefore, the parties contracted without reference to these unforeseen or unforeseeable difficulties. In the case at bar, the difficulties were foreseen and the clause containing the provisions with regard to "short pack" was intended by the parties to cover a situation such as here existed. In the *Carnegie Steel Co.* case neither party at the time it signed the agreement knew that the process hitherto used would not produce the article to be delivered. In the Pastene case, both parties did know that new machinery would be required and that the industry was in its infancy in the United

States, and they contracted with reference to that fact.

Mr. Pastene says in his deposition (Tr. p. 158):

> "It was an article which, prior to the war, to my knowledge had never been manufactured in this country. As a result of the abnormal conditions, the exportation from Italy was curtailed, embargoes were placed from time to time until ultimately the exportation was entirely prohibited. As a result of this, domestic canners of tomatoes principally interest themselves in imitating the article, or manufacturing it here from the American tomato. However, this necessitated, of course, the installation of new machinery, new arrangements, so that *it was not possible to produce in quantities* to take care of the entire demand and consumption of the people who were accustomed to using this product."

But in addition to these distinctions, we find that the correspondence between the parties throws considerable further light upon their construction of the agreement. The plaintiff in error prepared from its books the tabulation found on page 32 of the Transcript (defendant's exhibit "A"), showing the names of every person with whom it had a contract for the sale of Salsa, the number of cases contracted for, the quantity delivered, the per centage of delivery and the price. That table shows that the pro rata proportion to which each customer was entitled was 18.2% of the amount contracted for; that the plaintiff in this action received 22.2% of the amount contracted for, which was more than its pro rata proportion, based upon this tabulation,

and was the highest proportion delivered, except in three instances, in which 50% was delivered, but all three of those cases were for very small deliveries and were made early in the season before the defendant realized the shortage that was about to occur. Counsel believed at that time, and still believes, that this tabulation shows that the plaintiff has received more than its pro rata share of defendant's 1916 pack of Salsa, and that this pack was short because of circumstances which the parties understood would relieve the defendant from further obligations. The defendant made the greatest profit out of its Salsa De Pomidoro and ran its plant to its fullest capacity. It was, of course, to the advantage of the defendant to produce all the Salsa De Pomidoro that it could.

On October 12, 1916, at the very beginning of the pack, the plaintiff was notified by the defendant that it did not look as if it would be possible to supply more than a 25% delivery, on account of the condition of the machinery. Quoting from that letter (See Tr. p. 42):

> "Your communications of recent dates were received. We have failed answering you sooner for several reasons. The writer has been very busy with factory operations, particularly with the new line for the salsini, which has proven a failure as to getting out the quantity that we expected, due to the fact that the tube system in our vacuum pans is wrong. We can only operate this for a short period and it takes from five to six times the time for cleaning out.

The tomato pulp contains quite a percentage of albumen and this causes the material in the tube to burn. We are now operating on about a 25% efficiency and been compelled to reduce the concentration so as to enable us to get some out.

We are now pretty late in the season and from all indications it appears that not over a 25% delivery can be made, of which we are extremely sorry, as we intended to make full delivery, notwithstanding that our contract provides for pro rate delivery."

In the reply to this letter it will be seen that the plaintiff makes no contention that the defects in the machinery were not a valid excuse for a short delivery. It says (Tr. p. 45):

"We regret exceedingly to learn of the serious difficulty you are experiencing with machinery, *owing to the fact that the tube system in your vacuum pans is wrong.* Certainly your advice that you cannot now estimate on making more than a 25% delivery is a severe disappointment. We certainly trust you will find that you have been over-conservative in making this estimate and that it will be possible for you to make considerably larger delivery than this statement would now indicate.

At this time we will only state that if you make every possible effort to produce these goods within your power, *as we doubt not you are doing,* we will surely meet you in reasonable fashion in considering the unfortunate condition which has confronted you. It is obvious, naturally, of course, that in any case we shall expect a full *pro rata* delivery of all such goods as you are successful in producing."

On November 2, the defendant again notified the plaintiff of its inability to make full delivery and

informed it that it was doubtful whether more than a 20% delivery could be made, for the reasons set forth in the previous letter (See Tr. p. 47). In answer to this letter, P. Pastene & Co. wrote on November 7, 1916, which letter contained the following language (Tr. p. 48):

> "Pro-rata: We understand that weather conditions have greatly improved during the last ten days in your country and that a long packing season is anticipated. We surely trust that these predictions may not miscarry as in that case we are confident that you will find it possible to considerably increase the production which you previously estimated as possible. As previously written you, we certainly have no intention of being unreasonable or expecting from you that which it is physically impossible for you to accomplish, but *we do expect, of course, that you will spare no efforts to, as nearly as possible, fill your contracts,* and it is for this reason that knowing that conditions have materially improved since you previously wrote us on this subject, we look forward to a better delivery than previously predicted. *Knowing that you will not spare any reasonable efforts to attain the desired result,* we look forward in anticipation to your more favorable news as mentioned.
>
> Yours respectfully,
> P. Pastene & Co., Inc.,
> P. R. Pastene."

The gravamen of the plaintiff's contention is to be found in the underscored portions of the letter just quoted from, which contention was never departed from until the commencement of the trial. The defendant never at any time spared any efforts

to fill the contracts, and worked day and night to make the deliveries as large as possible.

On November 13, 1916, the defendant wrote to the plaintiff that it was finishing the packing of the Salsa De Pomidoro in order to make further delivery to its other customers, and that the plaintiff could expect no further delivery from it. (Tr. p. 50):

> "We are obliged to discontinue canning tomatoes, and are now running our line on the Salsa, expecting to finish the season on this so as to enable us to make good our 20% to our other firms who have not had 20%, and some none at all. We are doing this at a great loss to us, as you know the tomato market on 2½ cans has advanced about $1.00 per case."

In reply to this we have a telegram of December 19, 1916, from the plaintiff to the defendant. This telegram, marked Defendant's Exhibit "G" (Tr. p. 51), is as follows:

> "New York, Dec. 19, 1916.
> Grego Canning Co., San Jose.
> Salsa just arrived billed as tomato sauce instead of canned vegetables Southern Pacific demanding ninety cent rate. Kindly arrange agents there correct rate to forty. Further sauce very liquid not similar quality shipments made others sauce which considerably more concentrated. We protest the quality and *protect percent delivery* as against fifty sixty per cent made to others our contract one of the first made. Await your remarks.
> P. Pastene Co., Inc."

It will be noted that only per cent delivery is demanded. This telegram was followed by a letter of

the same date from the plaintiff to the defendant, from which we quote the following paragraph (Tr. p. 52):

> "*Pro rata delivery*: You give us a 23% delivery on our contract and we have since learned that other concerns have received considerably more. Two concerns who we know of in the South advised that they have received 50% delivery from you. Right is right, and we demand a fair, honorable deal, and we now ask you to please be good enough to tell us what you intend to do in the matter."

It will be seen from a perusal of this letter that the plaintiff's dissatisfaction appears to be caused by the information that others have received a 50% delivery while it had only received a 23% delivery. There is no contention that it is entitled to any more than a pro rata delivery.

On December 26, 1916, the defendant wrote a letter to the plaintiff (Tr. p. 56) explaining the reason for the variation in deliveries to the various customers:

> "In regards to your complaint as to short delivery, we assure you that you got a larger delivery than many others, some did not succeed in getting but 15½%. In the beginning of the season we thought that we would succeed in packing about a 50% delivery, but we regret to advise that we did not succeed in doing so. Your shipment being earlier than some of the others, constituted a larger delivery, while the very last that we shipped out, all that we could deliver, was a 15½%, as mentioned above."

The last letter between the parties prior to the commencement of the suit is dated January 10, (Tr. p. 57). We quote at length from this letter:

> "*Percentage of delivery:* We have no doubt that your statements are true in so far as they go. You tell of having delivered as low as 15½% but *you do not state the highest per cent against delivery.* We can only repeat that which we have already advised you—of information received from other sources of as high as 60% delivery and we certainly do not see why we should be elated at having received about 20% as against 15½% of some others.
>
> Lastly we note what you state about perfecting the machinery and your belief that during next season you can pack an article of good consistency—whatever that may mean, and that you desire to make up the deficiency or short delivery of this year by offering to protect the quantity you fell short on a basis $10.00 per case. Inasmuch as you are offering thru your New York brokers, Messrs. Seggerman Bros. & McNeill,—so we understand, for kindly note we do not make this as a positive assertion—on a basis of $11.00 per case f.o.b. terminal California with a 40% allowance for freight, we do not see where you are making us such a 'great' proposition.
>
> Honestly we are thoroughly disappointed! We cannot feel that you have treated us justly in this present season. Our information was that you *should have been able to deliver us 60%.* We have further information that you have sold pulp to various concerns—*We appreciate that possibly that was due to machinery trouble.*
>
> In conclusion, we can but state that we feel we are entitled to a *further* delivery on the 1916 pack and expect you will do so, and shipping a better quality than the one shipment made."

Even in this final correspondence between the parties there is no contention that a full delivery is demanded, but only that a further delivery should be made because of advices that others had received as high as 60%. This erroneous idea is fully dissipated by the tabulation marked Defendant's Exhibit "A" and found on page 32 of the Transcript.

The issue, therefore, between the parties, in our opinion, is not whether or not there was a crop failure, or whether or not the defendant could have gone out into the open market and obtained the product which it agreed to sell to the plaintiff, but whether the plaintiff has received its pro rata proportion of that product which was actually manufactured by the defendant from the 1916 tomato crop. The contract, viewed in the light of the correspondence and of the construction placed upon it by the parties, in our opinion is a contract for the sale of 3000 cases of Salsa De Promidoro, but the seller is to be excused from delivering any more than a pro rata proportion in the event it is unable, in the exercise of the highest good faith, to manufacture enough to supply all of its customers in full, whether that failure to manufacture is due to defects in machinery or otherwise; in fact, the defects in the machinery were within the contemplation of the parties, or otherwise the plaintiff would not have insisted in its letter of May 8, 1916 (Tr. p. 77) upon the sale being subject to approval of sample. The plaintiff knew and said that the defendant had never made any of this article before and had not

means of knowing the quality that the defendant would be likely to put up and, therefore, demanded samples for approval or rejection before it would be willing to accept the goods at all. The contract thereupon becomes not a consummated sale at all, but a sale subject to approval of sample. The plaintiff agrees to purchase 3000 cases, the output of the defendant's cannery, only in the event that its sample meets with the plaintiff's approval. This is not the ordinary canned-goods contract at all. It is a special contract entered into by the parties knowing the conditions of the trade and the fact that the article was not available in the United States at all, —that it was a new and dangerous venture; that it necessitated the installation of new machinery; and that, therefore, if the defendant should be unable to pack the specified quantity, a pro rated delivery only would be required, and if, whether by reason of defects in the machinery or ignorance of the methods of canning a high-class commodity, the article should fall short of what the plaintiff required for its trade, the plaintiff should have the right to reject the commodity manufactured by the defendant. It would have been impossible under this agreement and the interpretation placed upon it by the parties for the defendant to have gone into the open market and purchased this product, tendered it to the plaintiff, and thereby satisfied its obligations, because it expressly obligated itself to *specially manufacture* this article for defendant in error.

But there was no *absolute* promise upon the part of the Greco Canning Company to produce and sell to the defendant in error the amount of tomato sauce stated in the agreement. It was merely a pledge of good faith, and nothing more.

Kenan v. Yorkville Oil Co. (C. C. A., 4th Circuit), 360 Fed. 28.

The parties having in mind that the order was to be filled out of goods manufactured by the Greco Canning Company, there could be no actionable breach if the canning company, by reason of its inability to obtain tomatoes in the vicinity of the cannery, was unable to make full delivery.

Ontario etc. Assn. v. Cutting F. P. Co., 134 Cal. 21.

The distinction between a general undertaking to deliver a given amount of goods, and a sale of a specific lot of commodities (*Robinson v. MacLaine,* 167 Pac. 912) has some application here. When plaintiff in error sold this tomato sauce to the Pastene Company, the sauce was not in existence. The defendant in error knew that it had to be manufactured at the Greco cannery. If the defendant in error desired to impose upon the Greco cannery an *absolute* obligation to manufacture the full amount of tomato sauce mentioned in the agreement, it was its duty to require the canning company to insert such a covenant in the agreement. Having failed to do so, it has no right to import such a clause into the contract by implication (*Hudson Canal Co. v. Penn-*

sylvania Coal Co., 19 L. ed. 349). In other words the Greco Canning Co. merely represented that it intended to manufacture this brand of sauce at its cannery during the canning season of 1916. Out of whatever it might produce, it agreed to sell the Pastene Company the amount fixed in the agreement, and in the event sufficient tomato sauce was not produced during that season, to fill all orders taken by the canning company, then the amount produced was to be apportioned among the buyers.

The evidence shows that the defendant in error received its full pro rata of production. The canning company did not agree to do more than make a pro rate delivery of the amount packed by it during the season of 1916. Having done this, its contract was fully performed.

CONCLUSION.

The correspondence between the parties and surrounding circumstances indicate clearly that it was "quality" and not "quantity" which the defendant in error contracted for. It received "quality," not "quantity." The fact that it did not receive "quantity" was due to the very reason that it would have been possible only at a sacrifice of "quality," and this was exactly what the defendant in error did not want. A proper construction of the contract obtained from the contract as a whole and from the acts and interpretation of the parties thereunder, points ir-

resistibly to the conclusion that the clauses contained therein stipulating for excuses in case of "short pack" or failure to deliver were intended to apply to exactly the situation that occurred, and that the "short crop" coupled with the breakdown of the machinery of the plaintiff in error obviated the necessity of further performance by it under the terms of its agreement.

But even if this interpretation cannot be placed upon the contract, the judgment in favor of the plaintiff is grossly excessive and wholly unwarranted in view of the undisputed evidence in the record. This evidence conclusively shows that even if "short pack" be synonymous with "short crop", the defendant in error was only entitled to 36.36% of delivery, and having received 22.2% according to defendant's exhibit "A" (Tr. p. 32), the total amount to which it is entitled as damages under any interpretation of the contract is the sum of $975.00.

Dated, San Francisco,
October 8, 1921.

Respectfully submitted,

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